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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1942

No. **683**

J. S. SONDOCK AND M. G. SONDOCK,
INDIVIDUALLY AND AS PARTNERS DOING BUSINESS
UNDER THE NAME OF
McCANE-SONDOCK DETECTIVE AGENCY,
Petitioners,

vs.

L. METCALFE WALLING,
ADMINISTRATOR OF THE WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit,
AND BRIEF IN SUPPORT THEREOF

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January, 1943,
Houston, Texas



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The petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, whose decision in this case was filed December 12, 1942 (R. 242-244). No petition for rehearing was filed.

SUMMARY OF THE MATTER INVOLVED

Statement

This is an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., Sec. 201, *et seq.*), hereinafter referred to as "Act," to restrain petitioners from alleged violation of certain provisions of the Act. The District Court (Southern District of Texas, Houston Division) denied an injunction on the ground that petitioners, who furnish a local watchman or patrol service to their clients, constitute a service establishment and as such are exempt under the Act (R. 219-236, 235). The trial court did not determine whether petitioners' employees were covered by the Act if the exemption did not apply.

The Court of Appeals in reversing the decision of the District Court and remanding the cause, held that the employees were not engaged in a service establishment within the meaning of the Act and that "those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce performed duties having an essential relationship to the process of producing and distributing goods in interstate commerce" (R. 242-244). The Circuit Court of Appeals reached the conclusion that petitioners' employees were not engaged in a service establishment within the meaning of the Act, "upon the authority of *KIRSCHBAUM v. WALLING*, 316 U.S. 517, and by analogous reasoning" (R. 243).

Facts

Petitioners and their predecessors have been continuously engaged for fifty years in furnishing a night watch service

to various clients within the City of Houston and environs, all within the State of Texas (R. 34). They have in their employ 34 full-time night watchmen who perform regular night watching services for petitioners' clients. In all cases, petitioners' contract with their clients to furnish watch service for an agreed fee, and they select their own employees to perform the service contracted to be furnished. These employees are responsible solely to petitioners for the performance of the duties assigned to them. They are employed and paid by petitioners, and the manner in which they do their work is directed entirely by petitioners. Petitioners maintain a downtown office in the City of Houston, and the watchmen report there from time to time for instructions, reports, and to receive their pay checks (R. 35).

A stipulation of the parties describes in detail the kind and character of places watched by petitioners' employees (R. 35-75). Ten of the 34 employees perform watchman service only in connection with private residences and retail and service establishments which admittedly are not covered by the Act (R. 35-38). One employee is a relief watchman, serving on the various "beats" on the nights that the regular men assigned to such "beats" are off (R. 47). One employee, although classified as a watchman, works mainly in petitioners' office at night and answers phone calls by watchmen reporting prowlers, robberies or depredations, and performs other miscellaneous duties in connection with the operation of the business (R. 47). Thirteen of the employees are engaged exclusively in watching ten concerns (R. 36, 40-47). The remaining 9 employees are employed on "beats," each "beat" having on it a number of places to watch, the number varying from 29 on "Beat No. 35" to 16 on "Beat No. 6." On some of the "beats" the vast majority of the places watched consist of private residences and local retail or service establishments not covered by the Act. For instance, "Beat No. 5"

has on it 21 places to watch, 20 of which are retail stores or residences. "Beats Nos. 1, 2 and 3," combined for efficiency, have on them 68 places to watch, including one vacant building and 59 local retail and service establishments. Twelve of the 16 places watched on "Beat No. 6" are local retail or service establishments, and 24 of 29 places watched on "Beat No. 35" are local manufacturing, wholesale, retail and service establishments (R. 38-40, 49-75). The employees assigned to beats are in reality patrolmen. Their function is very similar to that of policemen assigned to patrol specified "beats" at night.

Employees making regular nightly rounds carry watchmen's clocks into which, at each place on their respective "beats," they insert numbered keys which are located at points in and about the places watched (R. 187-188). These keys are so located as to require the watchman to cover the entirety of the client's premises (R. 126, 175, 189-190). The watchmen who devote their time exclusively to the protection of plants of individual clients perform similar functions except that their continuous presence throughout the night is required in and about the one place watched (R. 40-47, 97-99, 105, 123, 125, 133, 140, 164). Except in one instance where a special arrangement is made for the use of the client's time clock, petitioners own and furnish all of the time clocks used by the watchmen, as well as the keys and key station established at the places watched. Petitioners have nearly \$4,000 invested in this character of equipment which is a necessary and integral part of the business of furnishing the watchman service (R. 194-195). Each watchman's clock has a paper dial on it which is changed daily. These dials show whether each watchman properly covered his assigned territory. The dials, except in one instance, are changed at petitioners' office (R. 211-213).

The District Court made the following unchallenged findings of fact based upon undisputed evidence:

1. Petitioners "serve approximately 294 clients, of whom approximately 59 are industrial concerns * * * and * * * 235 are owners of private residences or of purely local or intrastate concerns and about which there appears to be no dispute that they have no transactions whatever in interstate commerce" (R. 222-223). At the 59 industrial concerns petitioners' employees make their calls and do their watching at night when the plants are closed and not in operation except at three plants which are frequently in operation at such times (R. 224).
2. "All of these watchmen, without exception, are employed, discharged, directed and paid by defendants (petitioners). They are directed by defendants from a central office kept and maintained day and night by defendants, which office they visit as and when necessary, and with which they can (and) do communicate by telephone or by a clock and buzzer system owned and maintained by defendants" (R. 232-233).
3. "There is no evidence here, and apparently no claim, that defendants' contract with any of their clients was made to avoid the effect of the Act" (R. 233).
4. Petitioners' employees render petitioners' clients "no service other than a watch service" (R. 235).

Decision of the Circuit Court of Appeals

The court below did not disturb any of the findings of fact made by the trial judge, nor were any of those findings challenged by respondent. The Circuit Court did not hold that any of petitioners' employees were engaged in interstate commerce as distinguished from a process or occupation necessary to the production of goods for interstate com-

merce. It did hold (a question not passed on by the trial court) that "those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for interstate commerce performed duties having an essential relationship to the process of producing and distributing goods in interstate commerce" (R. 243). The court made no distinction between a watchman who devotes his time exclusively to watching the property of a concern engaged in the production of goods for interstate commerce and a watchman who patrols a beat having on it 21 places to watch, only one of which is engaged in the production of goods for such commerce. The degree of service rendered was totally disregarded, and the court ignored the fact *that a difference in degree may amount to a difference in kind*.

The court also held that petitioners' employees were not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act. This conclusion was predicated solely "upon the authority of *KIRSCHBAUM v. WALLING*, 316 U.S. 517, and by analogous reasoning" (R. 243). There is nothing said or implied in that case, when applied to the facts of this case, which warrants the decision rendered by the court below.

QUESTIONS PRESENTED

1. It being undisputed that all, or at least the greater part, of the watchman service furnished by petitioners' employees is in intrastate commerce, are said employees engaged in a service establishment and consequently exempt from the operation of the Act by virtue of Section 13 (a) (2) thereof?
2. Are those of petitioners' employees who perform patrol watchmen service for specified groups of clients, the large majority of which are not engaged in the production of goods for interstate commerce, themselves en-

gaged in a process or occupation necessary to the production of goods for interstate commerce and hence covered by the Act, merely because one or more of the clients for whom they perform patrol watchman service are engaged in such production?

3. Are any of petitioners' employees who perform any watchman or patrol service for a client who is engaged in the production of goods for interstate commerce, themselves engaged in a process or occupation necessary to such production so as to be covered by the Act?

Specification of Errors

The Court of Appeals erred:

1. In holding that petitioners' employees are not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act.

2. In holding that any of petitioners' employees are covered by the Act.

3. In holding that any watchman employed by petitioners, as an independent agency, and charged with the duty of watching buildings and machinery used by a client of petitioners to produce goods for commerce is covered by the Act, even though this particular function consists of only a very small part of the total watchman service performed by such watchman on each tour of duty.

REASONS FOR GRANTING THE WRIT

The discretionary power of this Court is invoked upon the following grounds:

The Circuit Court of Appeals has erroneously decided the

following important questions of Federal law which have not been, but should be, settled by this Court:

(a) That employees employed by an independent agency and engaged exclusively in rendering for clients of the agency a local watchman service, all or the greater part of which is in intrastate commerce, are not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act. This Court has not decided what is meant by a "service establishment" as that term is used in the Act. The decisions of the lower Federal Courts are in conflict on this question. For example see *WALLING v. SANDERS* (U.S.D.C., Tenn), 5 W.H.R. 710; *BURKE v. BROWN BAGGAGE CO.* (U.S.D.C., Tenn.), 5 W.H.R. 700; *LONAS v. NATIONAL LINEN SERVICE CORP.* (U.S.D.C., Tenn.), 5 W.H.R. 533; *CORBETT v. SCHLUMBERGER WELL SURVEYING CORP.*, 43 F. Supp. 605 (U.S.D.C., Tex.), discussed in the brief attached hereto, which in principle conflict with the decision rendered by the court below in this case. In view of the confusion resulting from the conflicting decisions and the extremely narrow definition adopted by the respondent in enforcing the Act, it is of national importance that an authoritative opinion be rendered which defines, as nearly as it may be clearly defined, the scope of the "service establishment" exemption.

(b) That a watchman, employed and directed by an independent agency, engaged exclusively in rendering for clients of the agency a local patrol watchman service is covered by the Wage and Hour provisions of the Act (29 U.S.C., Secs. 206 and 207) whenever, on the "beat" assigned to him, there is at least one client engaged in the production of goods for interstate commerce, and regardless of the fact that his "beat" may also include 20 other clients whose employees are not covered by the Act.

(c) That watchmen, employed and directed by an independent agency, engaged exclusively in rendering for clients of the agency a local watch service are covered by the Wage and Hour provisions of the Act if the clients for whom the watch service is performed engage in the production of goods for interstate commerce. The decision of the court below, in this respect, goes far beyond the holding of this Court in *KIRSCHBAUM v. WALLING*, *supra*. In this case the work of the watchmen, in the language of the *KIRSCHBAUM* case, "has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production" of goods for interstate commerce.

Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the Fifth Circuit Court of Appeals be reversed; and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners